

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Mr Geoff Gleeson
Director
International Trade Measures Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

2 December 2011

Copy: Mr Michael Kenna
Manager ITRB
Australian Customs and Border Protection Service

Our ref 11276/80125566

Dear Mr Gleeson

Investigation into Alleged Dumping - ITRB Report No 176 Certain Structural Timber Exported from Austria, Canada, Czech Republic, Estonia, Germany, Lithuania, Sweden and USA Visit Report - Australian Industry - Carter Holt Harvey Wood products Australia Pty Ltd (CHH)

As you know we act for Stora Enso and refer to Customs' Visit Report regarding Carter Holt Harvey Wood products Australia Pty Ltd (CHH).

Our client takes issue with and has a number of concerns regarding the Visit Report as follows:

- (a) whereas one of the major reasons for the visit was to verify the information provided in the application for publication of a dumping notice (**the application**), the Visit Report, especially that part titled "Economic Conditions of CHH", appears to be an uncritical acceptance of the assertions made in the application;
- (b) the Visit Report addresses the issue of causation but such consideration relies on material that has no probative evidentiary weight or basis;
- (c) whereas exporter visit reports are issued subject to a qualification as to the conclusion they reach, Customs' Visit Report is issued absent any qualification, save that some views depend on a finding of dumping;
- (d) Customs' analysis of material injury is fundamentally flawed as it uncritically accepts the argument put forward by the applicants, that material injury from dumped imports commenced in financial year 2009-10; and
- (e) the Visit Report perpetuates a legal error first made in Consideration Report No. 176 (**the Consideration Report**) - it accepts that material injury can arise prior to the investigation period.

2. **Material Injury**

- 2.1 In this case, the applicants asserted that they suffered material injury in the FY 2009-10, which is prior to the period of alleged dumping. Customs' Visit Report fails to acknowledge that material injury can only ever arise during the investigation period. In this respect, the Visit Report misconstrues the term "material injury" which has a specific legal meaning.

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Mr Geoff Gleeson, Australian Customs and Border Protection Service

2 December 2011

- 2.2 Proof of "Material injury" is a precondition to issue of a dumping notice.¹ This term was considered in *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564, by Black CJ, Neaves and von Doussa JJ (at 572):

"The 'material injury' to an Australian industry contemplated by s 269TG (1) is material injury which is the consequence of the dumping of the goods that have been exported to Australia. Section 269TG is not concerned with detriment which the Australian industry under consideration may have suffered from causes other than dumping, for example, declining demand due to economic recession, industrial unrest, or insufficient raw materials to permit the achievement of anticipated production output.

Where the Australian industry under consideration has suffered detriment from a number of causes, it will be necessary for the Minister to be satisfied that the industry has suffered detriment sufficient to meet the description 'material injury' within the meaning of the legislation in consequence of the dumping of goods that have been exported to Australia, and to quantitatively separate that material injury from detriment caused by other factors."

- 2.3 Thus, material injury can only arise as a result of or because of dumping. It follows that material injury cannot arise before an act of alleged dumping. The period prior to the investigation period retains but a limited use: it allows the identification of factors other than dumping, which must be discounted when establishing a causal link between harm to industry and alleged dumping.
- 2.4 In prior investigations, Customs itself has recognised this distinction. In Consideration Report No. 173, published on 17 September 2011, Customs acknowledged that:

"A causal link between dumped imports and material injury may be established only in circumstances where indicators of material injury are identified as being present during an investigation period"

- 2.5 The reference to 'material injury' occurring prior to the investigation period is wrong in law.

3. Economic Conditions of CHH

- 3.1 The second part of the Visit Report, titled "Economic Conditions of CHH", deals with various injury indices. Many of these indicators have been addressed in Stora Enso's previous submission. We reiterate those comments and make additional submissions regarding the following indices:

- (a) price depression;
- (b) price suppression;
- (c) profit;
- (d) volume; and

¹ s 269TG (1) of the *Customs Act 1901* (Cth) (the *Customs Act*); see also Article VI of the General Agreement on Tariffs and Trade 1994.

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Mr Geoff Gleeson, Australian Customs and Border Protection Service

2 December 2011

- (e) price undercutting.

Price Depression

- 3.2 Customs accepts that unit prices remained "steady" during the investigation period. This is in accordance with Figure 3 which demonstrates that there is no evidence of price depression during the investigation period. So far as price depression prior to the investigation period is concerned, this is independent of and unrelated to any alleged dumping.

Price Suppression

- 3.3 Figure 4 shows that over the course of the investigation period, unit prices increased but importantly, not at the same rate as unit CTMS. This demonstrates that even if there was some price suppression during the investigation period, it was influenced by factors other than alleged dumping.

Profit and Profitability

- 3.4 The Visit Report notes a decline in profit commencing in FY 2009/10 continuing into FY 2010/2011. Any profit decrease in FY 2009/10 cannot be ascribed to alleged dumping because it precedes the investigation period. It is difficult to assess the nature and extent of profit decrease in either year because no percentage figures are provided. Given that similar profit and profitability figures appear in the Consideration Report with percentage difference noted, it appears that the decline is immaterial.

Volume

- 3.5 Customs states that the alleged dumped imports have increased their market share at the same time as the share of the Australian market declined. We submit that:
- (a) the document relied on by Customs should no longer be considered confidential and should be released because parts of it are unveiled in the application and the figures for production volumes are those for all 3 members;
 - (b) Customs' simply repeated the claims of CHH, which are the same as those made in the application;
 - (c) Customs failed to consider the impact of factors other than the alleged dumped imports, such as the decline in the housing market and increase in volume of imported structural timber in the investigation period; and
 - (d) Customs ought to have analysed the trend in these other factors (i.e. the housing market and volume of imported structural timber) both during and before the investigation period.

Price Undercutting

- 3.6 Customs was provided with two main allegations:
- (a) that the importers offered lower prices via ad-hoc specials; and
 - (b) that the importers offered smaller customers the same prices that may have been available to larger customers.

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Mr Geoff Gleeson, Australian Customs and Border Protection Service

2 December 2011

3.7 We submit that:

- (a) the allegation of price undercutting covered the period February 2009 to June 2011 whereas the period February 2009 to 30 June 2010 (void period) is before the investigation period; price undercutting in the void period is irrelevant to the alleged dumping;
- (b) to the extent that the latter period suggests price undercutting, it reflects a competitive market which existed before the alleged dumping; and
- (c) the Visit Report does not purport to have evidence of actual sales or contract prices at all yet in the absence of this information still determines that there is evidence of price undercutting.

3.8 Stora Enso considers that the Visit Report is defective in that it does not disclose to which party the allegation of pricing behaviour is directed and can see no proper basis why the name of the party who is alleged to have offered specials and may have offered lower prices and specials cannot be named. Stora Enso requests that this information be provided

3.9 It is of concern that the allegations made on pricing behaviour have not been the subject of any verification process even though the purpose of the visit was to verify information.

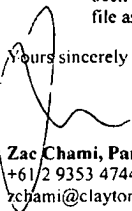
4. Conclusion

4.1 Stora Enso can only register its concern that there should be an objective assessment of the allegations made in the application. The Visit Report appears to repeat and accept the applicants' claims. Reference to material injury arising before the investigation period is a serious legal error, one that infects Customs' analysis of causation and material injury during the period of investigation. Customs should have recognised that in accordance with established legal principle, material injury must occur during the period of investigation. In failing to do so, the Visit Report is infected with error.

4.2 Similarly, our client considers the statements made about price undercutting to be without any proper evaluation of the applicants' evidence.

4.3 Finally, Stora Enso notes that although this Visit Report has been placed on the public record there have been two other visits, one to Hynes, the other Gunns, but neither Visit report has been placed on the public record. Our client requests that these reports be placed on the public file as a matter of urgency.

Yours sincerely



Zac Chami, Partner
+61 2 9353 4744
zchami@claytonutz.com